Supreme Court, U.S.
FILED
AUG 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-218

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ANDREW GORDON LEONARD,

Petitioner,

v.

TOWN OF HERNDON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DEXTER S. ODIN
Town Attorney
BRUCE M. BLANCHARD
Deputy Town Attorney
10505 Judicial Drive
Fairfax, Virginia 22030
(703) 385-7700

Counsel for Respondent
Town of Herndon

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
JURISDICTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
A. Lack of Jurisdiction	2
B. Lack of Any Rule 17 Considerations	3
CONCLUSION	4

TABLE OF AUTHORITIES

CASES: Page

Corbitt v. New Jersey, 439 U.S. 212, 99 S. Ct. 492, 58 L.Ed. 2d 466 (1978) 4

Haas v. State, Bureau of Motor Vehicles, 7 Ohio App. 3d 139, 545 N.E.2d 974 (1982) 4

Veilleux v. Springer, 300 A.2d 620 (Vt. 1973) 4

Voyles v. Thorneycroft, 398 F. Supp. 706 (D. Ariz. 1975) 4

STATUTES AND RULES:

§ 18.2-268 of the *Virginia Code* 1

28 U.S.C. § 1257 1

Rule 17 of the *Rules of the Supreme Court of the United States* 3

JURISDICTION

Although Petitioner claims jurisdiction under 28 U.S.C. § 1257 (presumably relying upon that portion of the statute which concerns the validity of a state statute drawn in question on the ground of its being repugnant to the Constitution of the United States), he fails to frame an appropriate question which was raised or decided by the Virginia Supreme Court in accordance with 28 U.S.C. § 1257. The Virginia Supreme Court did not decide whether or not the Virginia "Refusal" Statute (§ 18.2-268 of the *Virginia Code*) was constitutional, but instead specifically held that the Petitioner had no *standing* to assert this question because he has not suffered the alleged constitutional wrong which he claims the statute inflicts.

The record in the case clearly demonstrates that Petitioner was *not* unconstitutionally coerced into foregoing his right to plead not guilty and to go to trial on the criminal charge of Driving While Intoxicated (DWI), which he asserts is the constitutional defect in the Virginia DWI/Refusal statutory scheme. The record in this case shows that, by exercising this constitutional right, Petitioner was in fact *acquitted* of the serious criminal offense of DWI, and he therefore never suffered any harm or prejudice of the type of which he now complains. Accordingly, there is no constitutional question, nor has there been any infringement upon the Petitioner's constitutional rights, and the Petition should be denied for want of jurisdiction.

STATEMENT OF THE CASE

While Respondent essentially agrees with Petitioner's statement of the case, it is important to

add two points. First, the Petitioner is factually guilty of unreasonably refusing to submit to an alcohol test. *He has not challenged this finding.* Secondly, it is important to note that there has never been any factual testimony from, nor proffer by, the Petitioner that he was unconstitutionally coerced to forego his Fifth Amendment right to plead not guilty and to go to trial. Petitioner has never identified any facts which would support his contention that the Refusal Statute caused him to waive this constitutional right, and, instead, the record reveals that Petitioner has, without exception, plead not guilty and proceeded to trial on all the charges brought against him by the Town of Herndon. The record of this case is thus completely devoid of any evidence which would tend to support Petitioner's claim, and, instead, clearly refutes such a contention.

REASONS FOR DENYING THE WRIT

A. LACK OF JURISDICTION

A review of Petitioner's writ fails to disclose any constitutional wrong suffered by Petitioner. Petitioner repeatedly states that the primary evil of the Virginia DWI/Refusal statutory scheme is that it unconstitutionally coerces an individual to forego his constitutional right to plead not guilty and to go to trial on the DWI charge. However, it is undisputed that the Petitioner never fell prey to this alleged evil. Instead, the record reveals that Petitioner exercised his constitutional rights, and avoided conviction on the DWI charge. In fact, the record of this case fails to reveal a single fact or assertion that supports a finding that Petitioner even *felt* coerced into pleading guilty to the DWI.

Respondent submits that had Petitioner been unconstitutionally coerced to plead guilty to the DWI he would have entered such a plea, or he at least would have presented some evidence in the record supporting his contention. Respondent further submits that the reason Petitioner did not present any such evidence is because his primary concern was to avoid conviction on the more serious offense of DWI. Petitioner, after being advised of the consequences, knowingly refused to take a blood alcohol test at the time of his arrest because he desired to avoid conviction on the DWI. After thus depriving the Town of this evidence in violation of the law, Petitioner took advantage of his refusal by knowingly and voluntarily entering a plea of Not Guilty to the DWI charge at trial. Petitioner never had any intention nor inclination to plead guilty to the DWI charge, but instead, his actions indicate his primary goal was to avoid conviction. He is thus estopped from arguing that he was unconstitutionally encouraged to plead guilty.

There simply is no constitutional question now before the Court. Petitioner has not suffered the wrong which he claims the statute presents, nor has he provided the Court with a single piece of evidence which tends to even lend support to his claim. Did the Virginia Supreme Court err in holding Petitioner lacked standing to assert an alleged wrong which Petitioner never sustained? Absolutely not.

B. LACK OF ANY RULE 17 CONSIDERATIONS

The Petition is devoid of any of the considerations usually governing the granting of a review of certiorari as set forth in Rule 17 of the *Rules of the Supreme Court of the United States*. No conflict of

the ruling of the Virginia Supreme Court with other courts is articulated. While Petitioner cites other state court cases involving the constitutionality of DWI/Refusal Statutes, he fails to point out any decisions concerning a similar fact pattern to the case at bar where a finding of *standing* has been made. Petitioner's references to decisions in other jurisdictions involve reviews of specific statutory schemes dissimilar to that of Virginia, and involve circumstances where the individual challenging the statute arguably suffered some wrong.[1] These cases are thus not "in conflict" with the ruling on standing made by the Virginia Supreme Court in the present case.

Secondly, Petitioner has not articulated any important federal question decided by the Virginia Supreme Court which is in conflict with any applicable decisions of this Court. The Virginia Supreme Court did not rule that the refusal statute is constitutional or unconstitutional. The Court merely held that the Petitioner has not shown that he suffered the wrong which he alleges arises from the statute. That is the *only* ruling made by the Court.

CONCLUSION

Respondent requests that this Court deny the Petition for want of jurisdiction and for lack of any

---

[1] It should also be pointed out that the two state court decisions striking down refusal statutes, *Veilleux v. Springer* and *Voyles v. Thorneycroft*, were both decided before this Court's decision in *Corbitt v. New Jersey*. The only other constitutional challenge of this nature in the past fourteen years occurred in *Haas v. State, Bureau of Motor Vehicles*, decided four years *after Corbitt*. In *Haas*, the Ohio Court, relying upon the *Corbitt* decision, upheld the statutory scheme.

important issue needed to be decided by this Court. Petitioner has simply failed to allege or demonstrate any injury caused him by the Virginia DWI/Refusal Statutes, and the ruling of the Virginia Supreme Court is clearly correct.

Respectfully submitted,

THE TOWN OF HERNDON
DEXTER S. ODIN
Town Attorney
BRUCE M. BLANCHARD
Deputy Town Attorney
10505 Judicial Drive
Fairfax, Virginia 22030